No. 82-786

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In The

Supreme Court of the United States

October Term, 1983

UNITED STATES OF AMERICA,

Petitioner,

vs.

JOHN DOE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether an individual may invoke his Fifth Amendment right not to incriminate himself in response to a grand jury subpoena compelling him to produce his private papers where the government has stipulated the contents of the papers are incriminatory and relate to sole proprietorships?

2. Whether an individual's act of producing incriminating private papers, the existence of which is unknown to the government, is a testimonial communication protectable by the Fifth Amendment?

3. Whether the government's offer of "constructive use immunity" is co-extensive with an individual's Fifth Amendment right not to be compelled to produce incriminating documents, the existence of which is unknown to the government?

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

In November and December, 1980, five separate grand jury subpoenas were served on respondent, the target of a grand jury investigation. The subpoenas commanded respondent in his personal capacity to appear before a grand jury and produce his private papers, documents and records.

On November 19, 1980, the grand jury issued two subpoenaes to respondent requiring production of (1) the telephone toll records of five named companies, and (2) "all records including but not

limited to bank statements, cancelled checks, check stubs and deposit tickets, for the period January 1, 1977 to present" for four identified bank accounts (Pet. App. 28a, 31a).

On November 25, 1980, the grand jury issued a third subpoena to respondent calling for production of "any and all records as per the attached Schedule A for (a named company) for the period January 1, 1976 to present." Schedule A listed twenty-eight items, including such documents as general ledgers, general journals, paid bills, invoices, payroll records, contracts and copies of contracts (including all retainer agreements), tax returns, safe deposit box records, all W-2 forms for each partner, associate and employee (Pet. App. 32a, 33a). A fourth subpoena was issued on December 19, 1980, seeking production of another laundry list of documents relating to another named company (Pet. App. 34a).

Finally, on December 29, 1980, the grand jury directed respondent to produce "any and all bank statements and cancelled checks for the period January 1, 1976 to present" for accounts of a named company maintained at certain banks (Pet. App. 36a).

In early January, 1981, respondent moved to quash the above subpoenas on the grounds that the compelled production of the records would violate his right against self-incrimination under the Fifth Amendment. The government conceded for purposes of the motion that the records sought related to sole proprietorships, that they were in respondent's possession and that they did incriminate respondent (Jt. App. 20, 21).

By opinion of February 4, 1981, the District Court granted substantially all the relief sought by respondent. It ordered only records required to be kept by law produced (Pet. App. 23a-27a). The District Court held the act of producing the records to have communicative aspects which warranted Fifth Amendment protection.

On February 19, 1981, the government moved for reconsideration and after briefs and oral argument and by order of April 8, 1981, said motion was denied.

The government appealed and the Court of Appeals for the Third Circuit affirmed. First the court rejected the government's argument that it must consider the size of the organization from which the records are subpoenaed and if it is of sufficient size the court should find a separate entity and apply those cases dealing with documents held by a collective group. The court stated:

> In *Bellis, supra,* the Supreme Court made it clear that, in evaluating a fifth amendment claim, the critical factor was not the size of the organization, the records of which were being subpoenaed, but rather the nature of the capacity — either personal or representational — with respect to which the privilege was claimed. The *Bellis* Court drew "a bright line between organizations that have recognizable juridical existence apart from [their] members," such as corporations or partnerships, and "those which do not," such as sole proprietorships. (citations omitted) While extending the *Wilson* line of cases to a partnership, on the ground that a partnership constituted an "organized, institutional activity," 417 U.S. at 92, the Justices explicitly declined to conclude that the same would be true with respect to sole proprietorships:
>
> > It has long been established, of course, that the Fifth Amendment privilege against self-incrimination protects an individual from compelled production of his personal papers and effects as well

> as compelled oral testimony. . . . *The privilege applies to the business records of the sole proprietor as well as to personal documents containing more intimate information about the individual's private life.*

Id. at 87-88 (emphasis added).

(Pet. App. 6a, 7a).

The court then analyzed the recent pronouncements from this Court finding under these cases "an individual's business papers, as well as his personal records, cannot be subpoenaed by a grand jury" (Pet. App. 14a).

The court next applied the rule of *Fisher* finding its three requirements present here. It found production by respondent of the subpoenaed records would result in (1) compulsion of a (2) testimonial communication that is (3) incriminating. Since compulsion was supplied by the subpoena and incrimination was stipulated by the government, the discussion was concerned with the testimonial communications required by production. The court recognized the two situations found in *Fisher* where production in response to a subpoena has communicative aspects, *i.e.*, (1) an admission of existence of the records and their possession and control by the target and (2) the authentication of the records by the target. As to the first, the court stated:

> In the matter *sub judice*, however, we find nothing in the record that would indicate that the United States knows, as a certainty, that each of the myriad documents demanded by the five subpoenas in fact is in the appellee's possession or subject to his control. The most plausible inference to be

> drawn from the broad-sweeping subpoenas is that the government, unable to prove that the subpoenaed documents exist — or that the appellee even is somehow connected to the business entities under investigation — is attempting to compensate for its lack of knowledge by requiring the appellee to become in effect, the primary information against himself.

(Footnote omitted, citation omitted.) (Pet. App. 15a, 16a).

As to the second requirement, the court noted that since the subpoenaed documents were most likely prepared by respondent they could not be authenticated without respondent's participation. Therefore, the court found responding to the subpoenaes would represent a substantial threat of self-incrimination protectable in this case by the Fifth Amendment.

Next, the court rejected the government's argument that respondent's Fifth Amendment claim was a "blanket claim" and not specific (Pet. App. 18a, 19a). The court found even if a "blanket claim" was originally posited it was not upheld by the District Court when it ordered production of all records required to be kept by law.

Finally, the court declined to reach the question of whether an award of use immunity by the government overrides respondent's Fifth Amendment claim since no offer of immunity was ever solidified or immunity granted (Pet. App. 19a, 20a).

SUMMARY OF ARGUMENT

I.

This case presents the question whether an individual can be compelled to produce incriminating private documents to a grand jury when he is the target of the investigation and invokes his Fifth Amendment right not to be a witness against himself.

This Court has never sanctioned what the government seeks in this case. In fact, on every occasion it has had the opportunity to rule in the area, it has made clear that the type of documents sought here are protectable by the Fifth Amendment. In *Bellis v. United States*, 417 U.S. 85 (1974) the Court found no Fifth Amendment protection in partnership records, but restated its long held position that "The privilege applies to the business records of the sole proprietor or sole practitioner as well as personal documents containing more intimate information about the individual's private life." *Id.* at 87.

II.

In addition to the above protection of the contents of the subpoenaed documents. *Fisher v. United States*, 425 U.S. 391 (1976) gives Fifth Amendment protection to the act of production. *Fisher* held an individual cannot be compelled to produce incriminating documents if production would entail the potentially incriminating testimonial acts of admitting their existence, possession and acknowledging their authenticity. Here where the government has utterly failed to demonstrate any connection between the individual subpoenaed and the documents, the admittance of the existence of the documents warrants Fifth Amendment protection.

III.

No immunity or exclusionary rule that does not include the contents of the subpoenaed documents is co-extensive with an individual's Fifth Amendment privilege where no connection has been shown by the government between the individual and the subpoenaed records.

ARGUMENT

I.

An individual's Fifth Amendment right not to be forced to incriminate himself protects him from compelled production of his private documents.

An analysis of the Fifth Amendment's protection of an individual from compelled production of incriminating documents must begin with an understanding of the policies underlying the privilege. As the Court stated in *Murphy v. Waterfront Comm.*, 378 U.S. 52, 55 (1963):

> The privilege against self-incrimination registers an important advance in the development of our liberty — "one of the great landmarks in man's struggle to make himself civilized." Ullmann v. United States, 350 U.S. 422, 426. It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair

> play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load," 8 Wigmore, Evidence (McNaughton rev., 1961), 317; our respect for the inviolability of the human personality and of the right of each individual "to a private life," United States v. Gruenwald, 233 U.S. 391; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent." Quinn v. United States, 349 U.S. 155, 162. (Footnote omitted.)

While the most discussed policy underlying the protection of documents from compelled disclosure is the privacy rationale, *Boyd v. United States*, 116 U.S. 616 (1886), the other policies enunciated in *Murphy* are equally valid. For example, to permit the government to compel an individual to surrender his incriminating documents which the government intends to use against him, would strike a blow at "our preference for an accusatorial rather than an inquisitorial system of criminal justice" and the principle that "the government in its contest with the individual . . . shoulder the entire load. . . ." This is most striking where as here, many of the documents sought are readily available from other sources such as banks or other financial institutions. It should be preferred that before an individual is required to produce these documents the government exhaust its available sources, otherwise the individual will become his own chief accusor. This was clearly recognized by the court below when it stated:

> Our decision in no way impinges on the legitimate investigatory activities of law enforcement officials.

> For example, many of the records sought from the appellee in this case no doubt could be obtained by the government from other sources. . . . In this case, however, the government in effect asks the *appellee himself* to provide it with any and all documents in his possession that might incriminate himself. It is precisely that sort of expeditation that the fifth amendment traditionally has been interpreted to prevent.

(Footnote omitted.) (Pet. App. 17a).

The right of an individual to be free from self-incrimination through surrendering incriminating documents against his will to the government finds its origin in early English common law. L. Levy, *Origins of the Fifth Amendment,* 390 (1968); *Roe v. Harvey,* 98 Eng. Rep. 302, 305-6 (K.B. 1769); *Entick v. Carrington,* 19 How. St. Tr. 1029 (1765); *King v. Hayden,* 96 Eng. Rep. 195 (K.B. 1762). It was recognized by the framers of the Fifth Amendment as evidencing "their judgment that in a free society, based on respect for the individual, the determination of guilt or innocence by just procedures, in which the accused made no unwilling contribution to his conviction was more important than punishing the guilty." L. Levy, *supra,* 432. The framers recognized the Fifth Amendment to be "a central feature of the accusatorial system of criminal justice." L. Levy, *id.*

Decisions of this Court, beginning with *Boyd v. United States,* 116 U.S. 616 (1886), have consistently recognized that the Fifth Amendment protects an individual from compulsory production of his private records. While the government argues many of the teachings of *Boyd* are no longer valid, they fail to recognize *Boyd's* underlying basis is still sound.

In *Boyd,* the government brought an action against two business partners seeking the forfeiture of goods imported pursuant

to a fraudulent invoice. A statute then empowered the government to subpoena the invoices and provided that failure to comply would result in the forfeiture of the goods. The District Court enforced the subpoena over the Fourth and Fifth Amendment claims of the partners. In reversing the decision of the District Court, Justice Bradley stated:

> Any compulsory discovery by extorting the party's oath or compelling the production of his private books and papers, to convict him of a crime, or to forfeit his property, is abhorrent to the instincts of an American. It may suit the purposes of this despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom.

Id., 631-632.

The Court went on to hold that:

> . . . compulsory production of the private books and papers of the owners of goods sought to be forfeited . . . is compelling them to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution.

Id., 634-635.

In every decision since *Boyd* in this area, the Court has recognized the privacy rationale of the Fifth Amendment and in no case has the Court permitted the government what it seeks to do here.

Those cases permitting compulsory production of records from one holding them as a representative of a collective entity

all premised their decision on some compelling governmental interest and carefully preserved the individual's privilege. In *Wilson v. United States,* 221 U.S. 361 (1911) the Court held a corporation's records were not privileged from compelled disclosure. The Court carefully distinguished *Boyd* by stressing that in *Boyd* the papers in question were the "private papers of the claimant" while there the petitioner held them only in a representative capacity. And in *United States v. White,* 322 U.S. 694 (1943) the Court in holding a labor union's records not privileged, stated the rationale for this line of cases:

> The reason underlying the restriction of this constitutional privilege to natural individuals acting in their own private capacity is clear. The scope and nature of the economic activities of incorporated and unincorporated organizations and their representatives demand that the constitutional power of the federal and state governments to regulate those activities be correspondingly effective. The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible. See Hale v. Henkel, supra, 70, 74; 8 Wigmore on Evidence (3d ed.) Sec. 2259a. The framers of the constitutional guarantee against compulsory self-disclosure, who were interested primarily in protecting individual civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such organization so as to nullify appropriate governmental regulations.

> The fact that the state charters organizations and has visitorial powers over them provides a convenient vehicle for justification of governmental investigation of corporate books and records. Hale v. Henkel, supra; Wilson v. United States, supra. But the absence of that fact as to a particular type of organization does not lessen the public necessity for making reasonable regulations of its activities affective, nor does it confer upon such an organization the purely personal privilege against self-incrimination. Basically, the power to compel the production of the records of any organization, whether it be incorporated or not, arises out of the inherent and necessary power of the federal and state government to enforce their laws with the privilege against self-incrimination being limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records.

Id. at 700-701.

And in discussing the personal nature of the privilege, the Court stated:

> The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals. It grows out of the high sentiment and regard of our jurisprudence for conducting criminal trials and investigatory proceedings upon a plane of dignity, humanity and impartiality. It is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any

> personal documents or effects that might incriminate him. Physical torture and other less violent but equally reprehensible modes of compelling the production of incriminating evidence are thereby avoided. The prosecutors are forced to search for independent evidence instead of relying upon proof extracted from individuals by force of law. The immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime. While the privilege is subject to abuse and misuse, it is firmly embedded in our constitutional and legal frameworks as a bulwark against iniquitous methods of prosecution. It protects the individual from any disclosure, in the form of oral testimony, documents or chattels, sought by legal process against him as a witness.

Id. at 698-699.

In *Bellis v. United States,* 417 U.S. 85 (1974), the most recent case dealing with the records of a collective group, the Court held partnerships records not protected by the Fifth Amendment. The Court cited with approval the above quoted language of Justice Murphy in *White* as justification for excepting from the privilege partnership records. *Id.* at 90-91. In so doing, the Court recognized the privacy policy of the Fifth Amendment, *id.* at 91, and the protection afford an individual's business records when it stated:

> It has long been established, of course, that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony. . . .

> The privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life. *Boyd v. United States, supra; Couch v. United States* 409 U.S. 322 (1973); *Hill v. Philpott,* 445 F.2d 144 (7th Cir.) *cert. denied,* 404 U.S. 991 (1971); *Stuart v. United States,* 416 F.2d 459, 462 (5th Cir. 1969). As the Court explained in *United States v. White, supra,* at 698, "(t)he Constitutional privilege against self-incrimination . . . is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him." See also, *Curcio v. United States,* 354 U.S. 118, 125 (1957); *Couch v. United States, supra,* at 330-337.

Id. at 87-88.

In *Bellis,* the Court made clear that an individual has no legitimate expectation of privacy in records of a joint enterprise and that records of a law partnership are not privileged. However, *Bellis* recognized protection of records of (1) a small family partnership (2) a partnership of individuals in a pre-existing confidential relationship and (3) a loose non-organized association without existence independent of its individual members. *Id.*, 94, 101. Indeed in *Bellis,* the government even conceded the Fifth Amendment protection of records of a partnership of individuals in a pre-existing confidential relationship. *Id.* at 101.

In *Fisher v. United States,* 425 U.S. 391 (1975), the Court enforced summonses served on attorneys for documents given to

them by their clients. The documents sought however, were not documents belonging to the clients, but documents belonging to their accountants, which they had obtained and transferred to the attorneys. The Court first held that, although the summons did not compel the client to do anything, the client could still invoke his personal Fifth Amendment privilege as if the documents were in his own hands. The Court then held the records not protected by the client's personal privilege, since they were not his personal records but, rather his accountants'. To suggest as the government does, that *Fisher* overruled, *Boyd* is to ignore the plain language of the Court that it had not reached that issue. "Whether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a question not involved here; for the papers demanded here are not his 'private papers', *see Boyd v. United States,* 116 U.S. at 634-635."

That statement from *Fisher* defines the difference between it and the instant matter. In *Fisher* the personal privilege was not applicable to documents of another while here, the personal privilege applies to the "private papers" of the respondent.

These rulings make clear that only a natural person may invoke the privilege where his documents are sought to be compelled from him. They restate the Court's long-standing concern for the rights of an individual and recognized a legitimate public policy concern that government be granted access to documents of collective entities. The ruling further manifests the historic concern for protecting personal privacy. The Court has held the Fifth Amendment creates a zone of privacy which protects an individual and his personal records from compelled production and permits the compulsion of an organization because the privacy interest of the individual is not invalid. Even in *Fisher,* so heavily relied on by the government, the Court recognized it did not deal with the private papers of the accused, but with documents of his accountant. Moreover, in *Fisher,* the Court recognized the

privacy interests served by the privilege "[W]ithin the limits imposed by the language of the Fifth Amendment . . . the privilege truly serves privacy interests." 425 U.S. at 399. Here compelling the individual to surrender admittedly self-incriminating private documents falls squarely within the limits of the language of the Fifth Amendment.

The government's reliance of *Andresen v. Maryland*, 427 U.S. 463 (1976) for the proposition that an individual can be compelled to produce his private documents is misplaced. In *Andresen*, the Maryland state's attorney's fraud unit suspected that Andresen had defrauded the purchaser of certain real estate. On probable cause the state obtained a search warrant to search Andresen's office and Andresen was eventually convicted based largely on evidence seized during execution of the warrant. On review of Andresen's motion to suppress the seized documents the Court held the search of Andresen's office for business records, their seizure and introduction into evidence did not violate his Fifth Amendment privilege. The Court found the privilege not violated because Andresen was never compelled to do or say anything. Here, such is not the case since it is respondent who is being compelled to produce the documents.

The distinctions between the protection afforded the seizure of personal records pursuant to a warrant and when sought by a subpoena are real and meaningful. The difference is grounded on the compulsion present when one is served with a subpoena as opposed to its lack thereof when a search warrant is involved. No compulsion or cooperation is required of the accused when a seizure takes place. Furthermore, although it can be more intrusive, the seizure requires an independent review prior to its execution by a neutral magistrate which offers greater protection than the subpoena which is issued at the mere request of the government. Finally, an accused can always deny knowledge of the existence of documents seized during a search which is hardly

feasible when the documents are subpoenaed. The distinctions are grounded in solid principles fundamental in purpose.

Virtually every case from this Court involving the Fifth Amendment, finds protection for an individual's "private papers" based on personal privacy. *Feldman v. United States,* 322 U.S. 487, 490 (the Fifth Amendment is designed "to maintain inviolate large areas of personal privacy"); *Griswold v. Connecticut,* 381 U.S. 479, 484 (1965) ("The Fifth Amendment in its self-incriminating clause enables the citizen to create a zone of privacy which government may not force from him to his detriment"). *Schmerber v. California,* 384 U.S. 757, 763-764 (1966); *Gilbert v. California,* 388 U.S. 263, 266 (1966) ("The privilege reaches only compulsion of 'an accused's communications whatever form they might take', and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers' . . ."); *United States v. Wade,* 388 U.S. 218, 221 (1967); *United States v. Dionisio,* 410 U.S. 1, 11 (1972). ("The grand jury cannot require the production by a person of private books and records that would incriminate him"); *United States v. Calandra,* 414 U.S. 338, 346 (1973) (". . . a grand jury may not compel a person to produce books and papers that would incriminate him").

II.

Where existence, location and authentication of subpoenaed private papers is not demonstrated by the government the act of producing those documents by a target of a grand jury investigation is protectable under the Fifth Amendment.

The court below found that even if the contents of the subpoenaed documents were not protected under the respondent's privilege against self-incrimination, the act of producing them was

protected. In so finding the court recognized the testimonial nature of the act of production as set forth in *Fisher*. There this Court stated:

> The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It would also indicate the taxpayers belief that the papers are those described in the subpoena. *Curcio v. United States*, 354 U.S. 118, 125 (1957). The elements of compulsion are clearly present, but the more difficult issues are whether the tacit averments of the taxpayer are both "testimonial" and "incriminating" for purposes of applying the Fifth Amendment. These questions do not lend themselves to categorial answers; their resolution may instead depend on the facts and circumstances of particular cases or classes thereof.

425 U.S. at 410.

In *Fisher* the Court found the act of production there to be non-testimonial since the existence and location of the subpoenaed records was a "foregone conclusion". The Court stated:

> The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the government's information by conceding that he in fact has the papers.

425 U.S. at 411. There the Court established a low threshold an individual must pass to determine when the act of production constitutes acknowledgement of the existence of the material demanded. The act of production is protectable when it adds to the sum total of the government's information that the documents actually exist. In *Fisher* this Court found the act of production non-testimonial because it was undisputed the taxpayer's attorney possessed certain workpapers belonging to the taxpayer's accountant. Here no such concession has ever been advanced and indeed the court below found the opposite:

> In the matter *sub judice*, however, we find nothing in the record that would indicate that the United States knows, as a certainty, that each of the myriad documents demanded by the five subpoenas in fact is in the appellee's possession or subject to his control. The most plausible inference to be drawn from the broad-sweeping subpoena's is that the government, unable to prove that the subpoenaed documents exist — or that the appellee even is somehow connected to the business entities under investigation (footnote omitted) — is attempting to compensate for its lack of knowledge by requiring appellee to become, in effect, the primary information against himself.

(Pet. App. 15a, 16a). (Citations omitted.)

Now the government argues that since the documents subpoenaed are the kind usually kept by businesses, their possession, existence and control by this respondent "adds little or nothing to the sum total of the government's information." But the conclusion that this respondent possesses these records is pure speculation. The production of each document would admit its existence, a fact of which there is absolutely no proof the

government is aware. The act of production here would furnish the government with not only records and documents of which it was unaware it would also provide the "missing link" between respondent and the business and bank accounts enumerated. *See Hoffman v. United States*, 341 U.S. 479 (1951); *In re Katz*, 623 F. 2d, 122, 126 (2d Cir. 1980). Such admissions by respondent where the government has stipulated the incriminating nature of the documents, are certainly real and substantial hazards of incrimination. *United States v. Fox*, No. 83-6055 (2nd Cir., October 19, 1983); *In re Grand Jury Proceeding (McCoy v. Sussman)*, 601 F. 2d 162, 170 (5th Cir. 1979).

A second testimonial aspect of the act of production as recognized in *Fisher* is authentication of the documents. The court below found many of the subpoenaed records were most likely prepared by respondent and would be authenticated by the respondent by the act of production as admitting they were what was demanded in the subpoena. The court relied on the District Court's finding that:

> The government can give no assurance that the act of turning over the documents will not constitute incriminating admissions against [respondent] either before the grand jury or at a subsequent trial if he is indicted. The government argues that the existence, possession and authenticity of the documents can be proved without [respondent's] testimonial communication, but it cannot satisfy this Court as to how that representation can be implemented to protect [respondents] in subsequent proceedings.

(Pet. App. 16a).

Now the government argues authentication is merely a "technical requirement" which they can accomplish by any number of means. But these arguments ignore the fact that once the records are turned over they are automatically vouched for by the subpoenaed party to the grand jury as being the records called for in the subpoena. *United States v. Fox, supra.*

III.

The government's immunity offer is not coextensive with respondent's Fifth Amendment right.

The immunity offer arose below in response to a query by the District Court regarding the effect of a turnover order that would preclude the government from using the act of production in any way (66a.10). In response, the Assistant United States Attorney stated "[respondent] could produce the documents to the agents of the grand jury" (71a.6), and that authentication of the same could be done "by other means" (75a.20). Nonetheless, the Assistant United States Attorney represented to the court that "once in evidence, [respondent] cannot stand up on the witness stand and say, this is not my writing if it is in fact his writing" (76a.17). He further stated, in response to the judge's question "can he be asked whether he turned it over to the grand jury?"; he answered, "Yes, I think he can" (76a.24). This served as the foundation for the District Court judge's conclusion in his opinion that:

> Moreover, the government can give no assurances that the act of turning over the documents will not constitute incriminating admissions against [respondent] either before the grand jury or at a subsequent trial, if he is indicted.*

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* The government's position is that although [respondent's] testimony would not be needed in proving authentication,

> existence or possession of said documents, the communications nevertheless would be a proper subject of cross-examination at trial, if [respondent] decided to testify in his own behalf.

(Pet. App. 26a).

At the oral argument of the government's motion for reconsideration in the District Court, the government attempted to clarify its position with respect to what it soon labeled "the functional equivalent of use immunity." The following colloquy is most enlightening:

> THE COURT: Yes. The authentication, let's assume that:
>
> Now, if we get to that point and the Government then says, well, take that element away because we can prove authentication — and I come back to the same thing I have asked, I think this is a third time, third hearing — what difference does that make? If the act of turning it over by the target is a concession of authentication what difference does it make that the Government can also prove authentication, if a Grand Jury can conclude by the target turning it over that he is authenticating it, how does a Grand Jury know that the Government can otherwise authenticate it? How do I know that the Grand Jury will not rely on the act of turnover as the authentication?
>
> MRS. DESMOND: Well, of course, the easy answer to that and the answer I am sure you will get quickly is the immunity that the Government has offered.

> THE COURT: Nobody has offered that. I asked that question at all of the prior hearings, in other words, and I kept saying how it is implemented, and the word "immunity" was never used. In fact, there was even a suggestion that the act of turnover could be utilized at the trial of this case, for instance, if the defendant elected to take the stand."

(106a-107a). The crux of the District Court's doubt over the offer and grant of the purported immunity is as follows:

> THE COURT: Let me say this, Mrs. Desmond, I think in our prior discussions with the Government that I indicated that if there was some way that I could be assured that the act of turn-over would not be utilized against a target for the reasons of authentication establishing that he had possession or that it was an acknowledgement of the identity and existence of the document, that if the Government could assure me that that could be accomplished realistically then I would order the turn-over. And I was not satisfied after the colloquy with Government counsel that it could be accomplished. And that's why we always came back to that question, if you tell me that the Government can authenticate it otherwise, how do I know, how can I be assured that the act of turn-over will not be utilized against the target for authentication purposes? And I never had that issue resolved to my satisfaction.
>
> If you can resolve it to my satisfaction, I have no hesitancy in saying, yes, I will direct the turn-over, but only on the condition that the act of turn-over will not be utilized against the target.

> And I think Mr. Politan would agree that if he had that assurance then there is no problem.

(108a.3-108a.24).

Simply put, the scope and the contours of the purported offer of use immunity was never solidified to the extent that the District Court or appellee could be reasonably sure of the preservation of the appellee's Fifth Amendment rights. In particular, it is not known whether the grand jury, at any time in the past or in the future, was cognizant of, or would be made aware of the outstanding subject grand jury subpoena. If the grand jury was cognizant at any time, of the subpoena, it would necessarily be aware of the fact of the respondent's act of production as soon as the sought-after documents appeared "out of thin air" as it were. Even if physically brought before the grand jury by one of its agents, the compelled testimonial act (production) stares the grand jury in the face. The nexus between the grand jury subpoena and the presence of the subject documents is apparent. This eventuality was never squarely faced by the government, and becomes more vital in view of the government's equivocation as to the precise scope of the allowable use of the act of production.

The Circuit Court agreed with the District Court that the government offer was vague (Pet. App. 20a, f. 19). It found, since no immunity was granted the issue was premature and it declined to reach the general question of whether a grant of use immunity could override an individual's Fifth Amendment privilege with respect to the act of production.

Here the government's argument is still nebulous. It has changed the name of the immunity offered from the "functional equivalent of use immunity" a term it never defined below, to "constructive use immunity" but has done little to clarify its scope and parameters. Its entire position rests mistakenly on their

conclusion that the existence, location and possession of the records is a "foregone conclusion". Where, as here, this is incorrect, to immunize the act of production and admit the incriminating existence location and possession necessarily immunizes the contents of the records. The immunity must extend to the fact of the document's existence to be coextensive with the privilege, *Kastigar v. United States*, 406 U.S. 441 (1972); *New Jersey v. Portash*, 440 U.S. 450 (1979).

CONCLUSION

For all the above reasons, it is respectfully requested this Court affirm the judgment of the Court of Appeals.

Respectfully submitted,

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